Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term 1997

ROBERT P. BURCH,

Petitioner,

v.

THE COCA-COLA COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an employee whose disability is alcoholism must demonstrate a permanent secondary impairment to be protected under the Americans With Disabilities Act of 1990, 42 U.S.C. § 12102(2)?

2. Whether an employer is relieved of its duty to reasonably accommodate under the Americans With Disabilities Act of 1990, 42 U.S.C. § 12112(b)(5)(A) when the employee's disability substantially limits a major life activity other than working?

3. Whether leave for treatment is a reasonable accommodation under the Americans With Disabilities Act of 1990, 42 U.S.C. § 12112(b)(5)(A)?

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Robert P. Burch respectfully petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, 1a-48a) is reported at 119 F.3d 305.

JURISDICTION

The Court of Appeals entered its Judgment on July 30, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED IN THIS CASE

The Americans With Disabilities Act, 42 U.S.C. § 12112 states:

(a) General Rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction

As used in subsection (a) of this section, the

term "discriminate" includes:

* * *

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity.

The Americans With Disabilities Act, 42 U.S.C. § 12102(2) states that the term "disability" means, with respect to an individual

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
(B) A record of such impairment; or
(C) Being regarded as having such an impairment.

The implementing regulations of the Equal Employment Opportunity Commission (EEOC) for Title I of the Americans With Disabilities Act, 29 C.F.R § 1630.2(h), define "physical or mental impairment" as:

(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or

(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning

disabilities.

The EEOC's implementing regulations, 29 C.F.R. § 1630.2(i), define and interpret "major life activities" as follows:

> (i) Major Life Activities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

The EEOC's implementing regulations, 29 C.F.R. § 1630.2(j), define and interpret "substantially limits" as follows:

> (1) The term substantially limits means:
> (i) Unable to perform a major life activity that the average person in the general population can perform; or
> (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

The EEOC's implementing regulations, 29 C.F.R. § 1630.2(o)(2), interpret "reasonable accommodation" as follows:

> (2) Reasonable accommodation may include but is not limited to:
> (i) Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

> (ii) Job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provisions of qualified readers or interpreters; and other similar accommodations for individuals with disabilities.

The EEOC's implementing regulations, 29 C.F.R. § 1630.9(a), further state as follows:

> (a) It is unlawful for a covered entity not to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of its business.

STATEMENT OF THE CASE

Petitioner, Robert P. Burch, an individual with a disability of alcoholism, sued his former employer, Respondent, The Coca-Cola Company, for violations of the Americans With Disabilities Act (ADA) of 1990, 42 U.S.C. § 12101-12213 (1994), because it fired him while on leave for treatment for his alcoholism. Petitioner claimed that Respondent (1) intentionally discriminated against him by terminating him because of his disability and (2) discriminated against him by failing to provide a reasonable accommodation for his disability by not allowing Petitioner to take a leave of absence for treatment for his alcoholism and return to work after his treatment was complete.

The case was tried to a jury in the United States District Court, Northern District of Texas, Dallas Division, with United States Magistrate Judge Jeff Kaplan presiding. At the close of Petitioner's case, the Magistrate Judge granted Respondent's oral motion for judgment as a matter of law under Fed. R. Civ. P. 50 on Petitioner's intentional discrimination claim. This ruling was premised on the fact that Petitioner's evidence did not establish a prima facie case of intentional discrimination since he had presented no evidence that he was replaced by someone who was not disabled. The case was submitted to the jury on Petitioner's claim that Respondent discriminated against Petitioner by failing to provide a reasonable accommodation. The jury found that Respondent violated the ADA and awarded Petitioner actual and punitive damages.[1] The trial court entered Judgment for Petitioner. App., *infra*, 49a-50a.

Both Petitioner and Respondent appealed to the Fifth Circuit Court of Appeals.[2] The Fifth Circuit reversed the judgment holding, in pertinent part, that (1) Petitioner's

[1] In the largest jury verdict in an ADA case to date, the jury awarded actual and punitive damages totaling $7,109,000.00. The trial court significantly reduced the damages awarded to Petitioner, decreasing the front pay award, as well as the punitive damage award to comply with the statutory caps on compensatory and punitive damages.

[2] Petitioner appealed the trial court's dismissal of Petitioner's intentional discrimination claim. The Fifth Circuit did not reach the substance of the trial court's dismissal, as they affirmed this ruling by concluding that Petitioner did not meet the statutory definition of disability under the ADA. App., *infra*, 34a.

alcoholism was not an actionable disability under the ADA; (2) Respondent had no duty to provide a reasonable accommodation to Petitioner because his disability did not interfere with his ability to perform the essential functions of his job; and (3) Petitioner's request for leave to obtain treatment for his alcoholism was not a request for an accommodation under the ADA. App., *infra,* 15a.

I. The Disability

In 1989, Petitioner was recruited by Respondent and left a 24 year career with General Electric to become the Southwest Area Service Manager for Respondent's fountain division in Dallas, Texas. Petitioner was responsible for the installation and service of fountain machines in a vast multi- state area and supervised approximately twenty employees. During his employment, Petitioner was considered very technically astute, consistently evaluated highly, and received substantial pay raises, stock options and bonuses each year. However, all of Petitioner's written performance evaluations noted "working relationships" as a developmental area in which he should focus in each upcoming year. An important part of Petitioner's job was to manage and maintain good working relationships with others.

In May 1992, Petitioner was having problems with personal relationships outside of work and also experiencing emotional problems. He began receiving counseling from Cynthia Maddox, a clinical social worker with Respondent's Employee Assistance Program. Although Maddox thought that Petitioner's drinking was abnormal, she did not counsel him for alcohol abuse or

recommend treatment for him. During this time, Petitioner began to suspect he had an alcohol problem. He unsuccessfully began trying to control his drinking and began avoiding work and social situations where he normally drank. When Petitioner's problems did not improve by February 1993, he asked Maddox for a referral to a psychiatrist.

Petitioner then saw Dr. Joel Holiner who, after one visit, diagnosed Petitioner as suffering from "adjustment disorder with depressed mood" and "probable alcohol abuse." Dr. Holiner referred Petitioner to Marcelo Matamoros, MSW-ACP, for therapy. Although Petitioner's drinking had accelerated and Matamoros was cognizant of his alcohol problem, the primary focus of Matamoros' treatment of Petitioner was with his depression. As is common in alcoholics, Petitioner was resistant to deal with his alcohol problem.

Petitioner's drinking began at the age of 14. His drinking accelerated through the years. He was arrested for driving while intoxicated in 1986 and has had four failed marriages. Although Petitioner did not drink during working hours, he got drunk almost every night. Further, alcohol was an important part of Respondent's culture with alcohol served at all after 5:00 p.m. functions. Also, prior to seeing Maddox, Petitioner often drank after hours with other managers and superiors. For some time prior to seeking inpatient rehabilitation on September 26, 1993, at the age of 47, Petitioner had lost the ability to control the amount he drank. He had blackouts when drinking and suffered from insomnia and depression. Petitioner avoided interaction with people at work in the mornings, isolated himself in his office, and would tell co-workers "he wasn't a morning person."

Petitioner "hit bottom" with his disease in September 1993 after a work-related incident. Petitioner attended an Area Service Manager's meeting in Atlanta, Georgia. Following the meeting, there was a cocktail hour and company-sponsored dinner with alcohol served. Petitioner, who had been drinking, felt he had been unduly harassed all day long by two other managers who he used to drink with before avoiding work-related drinking outings. He engaged in a nonphysical confrontation when he mouthed obscenities at one of them. Petitioner began to question his behavior when drinking and finally realized he needed help. Matamoros' office arranged for Petitioner to enter treatment.

On September 25, 1993, the day before entering treatment, Petitioner called his supervisor, Perry Cutshall, to advise him that he was going into treatment. Cutshall told Petitioner to "do what he needed to do." Petitioner checked into Charter Hospital on September 26, 1996.

Dr. Edgar Nace, a board certified psychiatrist with a sub-specialty in addiction psychiatry, evaluated Petitioner upon entering Charter Hospital and diagnosed him as suffering from "alcohol withdrawal syndrome, alcohol dependence and possible depression." Petitioner was prescribed Librium for alcohol withdrawal syndrome and anti-depressants for depression.

Petitioner responded well to treatment and, with Dr. Nace's approval, Petitioner asked to return to work half days on October 6, 1993. Petitioner's supervisor, Cutshall, told Petitioner that he was suspended and could not return to work. On October 27, 1996, Petitioner

wrote Respondent asking to return to work immediately. Dr. Nace and Matamoros also wrote letters indicating that Petitioner could return to work and would be an improved employee. Instead, on November 4, 1993, one day before he was discharged from treatment, Petitioner was told that his employment was terminated for "performance issues". Respondent made this decision without following its own progressive disciplinary procedures. Petitioner was discharged from Charter Hospital the next day, November 5, 1993. He has not taken a drink of alcohol since entering Charter Hospital and has regularly attended meetings of Alcoholics Anonymous.

Petitioner's physician, Dr. Nace, testified at trial that Petitioner, like other alcoholics, was "powerless" to control his use of alcohol when he was actively addicted, before treatment. Dr. Nace also explained the difference between alcoholism and alcohol abuse as the loss of the ability to control how much one drinks. He further testified that alcoholism is a progressive disease and that he estimated that Petitioner's drinking had crossed over into alcoholism approximately ten years earlier. Dr. Nace testified that alcoholism is a permanent condition for which there is no cure; that the only way to recover is to stop drinking, but a person is still an alcoholic after he stops drinking. It was Dr. Nace's opinion that Petitioner was disabled under the definition set out in the ADA: that he had a physical or mental impairment that substantially limited a major life activity.

In reversing the judgment for Petitioner, the Fifth Circuit held, as a matter of law, that Petitioner's alcoholism did not substantially limit any major life activity. App., *infra*, 15a. The Fifth Circuit equated the

effects of Petitioner's alcoholism to "an overindulging social drinker", referring to it as a "temporary affliction". App., *infra*, 20a. The Fifth Circuit stated:

> "That [Petitioner's] inebriation was temporarily incapacitating is not determinative. [Petitioner] produced no evidence that the effects of his alcoholism-induced inebriation were qualitatively different that those achieved by an overindulging social drinker: in both situations, the natural result of overindulgence is the temporary impairment of senses, dulled reactions and the prospect of a restless sleep followed by an unpleasant morning." App., *infra,* 20a.

The Fifth Circuit also stated:

> " [Petitioner's] testimony that his inebriation was frequent does not make it a permanent impairment. Permanency, not frequency, is the touchstone of a substantially limiting impairment. Although [Petitioner's] alcoholism may have been permanent, he offered no evidence that he suffered from any substantially limiting impairment of any significant duration. App., *infra*, 21a.

Then, departing further from established precedent, the Fifth Circuit held that for an alcoholic to be protected under the ADA, he must demonstrate, in addition to alcoholism, an additional permanent impairment caused by the alcoholism:

> "This is not to say that an alcoholic can never demonstrate a substantially limiting impairment. But where, as here, an alcoholic's only proffered

> impairments are the primary result of temporary inebriation, such proof is insufficient. [Petitioner] offered no testimony that his alcoholism-induced inebriation permanently altered his gait, his ability to speak properly, his memory when sober or produced long term insomnia." App., *infra*, 21a, fn 9.

The Fifth Circuit also rejected Petitioner's hospitalization for his alcoholism as a "record of impairment" to establish he was disabled under the second prong of the definition of disability under the ADA, 42 U.S.C. § 12102(2)(B). In so doing, the Fifth Circuit rejected this Court's language in *School Board of Nassau County v. Arline*, 480 U.S. 273, 279-81, 107 S.Ct. 1123, 1127, 94 L.Ed.2d 307 (1987) that an impairment serious enough to require hospitalization is "a fact more than sufficient to establish that one or more [of her] major life activities were substantially limited by [her] impairment." *Id.* The Fifth Circuit reasoned that as Petitioner's alcoholism did not substantially limit any major life activity, a record of treatment for his alcoholism was not a record of a substantially limiting impairment. App., *infra*, 22a.

II. Reasonable Accommodation

Petitioner's requested accommodation from Respondent was a request for leave for treatment of his alcoholism. Although Respondent allowed Petitioner to leave for treatment, it did not allow him to return to work after his treatment was complete.

The Fifth Circuit held that Petitioner "had advanced no cognizable request for accommodation". App., *infra*,

25a. They further held that as Petitioner's alcoholism did not affect his ability to perform the essential functions of his job, there was nothing for Respondent to accommodate. App., *infra*, 15a. In so holding, the Fifth Circuit rejected Petitioner's arguments, stating:

> "[Petitioner] argues that 'to be protected under the ADA, an individual need only show that a major life activity is substantially limited; there is no requirement that the individual also show that he is limited in the activity of working as well.' This is true insofar as [Petitioner] may assert a claim for intentional discrimination under the ADA. To assert a discrimination claim under the reasonable accommodation provision, however, [Petitioner] must demonstrate that a substantially limiting impairment somehow affected his ability to perform his job. Without such a showing, there would be nothing for an employer to accommodate." App., *infra*, 16a fn4.

The Fifth Circuit further held that Petitioner's request for leave for treatment, which included returning to work after the completion of treatment, was not a request for an accommodation.

> "[Petitioner] did not request an accommodation, he requested to return to his position as he left it when he entered treatment on September 26, 1993. He sought no changes to his position and desired nothing more than the ability to resume his career where he had left it." App., *infra*, 28a.

REASONS FOR GRANTING THE PETITION

In passing the ADA, Congress recognized the need to provide legal redress for individuals employed in the private sector who experience discrimination as a result of a disability, as well as to assure "equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals." 42 U.S.C. § 12101(a)(4) and (8).

Extending the prohibition of discrimination against persons with disabilities to private employers, Congress modeled the employment provisions of the ADA on the sections of the Rehabilitation Act of 1973, 29 U.S.C. § 791, 793-794 (1988), which proscribe employment discrimination in the federal sector. H.R. REP. NO. 485, 101st Cong., 2d Sess., pt 2, at 2(1990); S. REP. NO. 116, 101st Cong., 1st Sess., at 2 (1989).

Under the Rehabilitation Act, alcoholism has always constituted a protected class of disability. With the enactment of the ADA, Congress extended many of the requirements developed under the Rehabilitation Act to the private employer, including the protection of alcoholics as disabled individuals and the duty of employers to reasonably accommodate them.

In a portentous deviation from the clear language of the statute and established precedent, the Fifth Circuit pummels three unintended burdens on an individual with a disability. First, the Court holds that for alcoholism to be an actionable disability under the ADA, an individual must demonstrate, in addition to his alcoholism, a permanent secondary impairment caused by the alcoholism. App., *infra*, 21a-22a. This decision conflicts

with all other circuit court cases dealing with alcoholics under both the Americans With Disabilities Act and the Rehabilitation Act.

Second, the Fifth Circuit holds that an employer has no duty to accommodate a disability which substantially limits a major life activity other than working. App., *infra,* 15a-16a, 25a-27a. This is in direct conflict with the decisions of the Seventh and Ninth circuits in *Homeyer v. Stanley Tulchin Associates, Inc.*, 91 F.3d 959 (7th Cir. 1996); *McWright v. Alexander*, 982 F.2d 222 (7th Cir. 1992); and *Buckingham v. U.S.*, 998 F.2d 735 (9th Cir. 1993), cases decided both under the ADA and the Rehabilitation Act.

Third, the Fifth Circuit holds that Petitioner's request for leave for treatment was not a request for an accommodation. App., *infra*, 28a-29a. This is in direct conflict with the Federal Circuit in *Office Of the Senate Sergeant At Arms v. Office Of Senate Fair Employment Practices*, 95 F.3d 1102 (Fed. Cir. 1996), as well as cases decided under the Rehabilitation Act.

This Court has yet to grant a petition in an ADA case and this case presents a timely opportunity to provide guidance on the most litigated areas under the ADA: the definition of disability and the duty to reasonably accommodate. Further, the decision below is erroneous and the issues that it addresses are important.

I. What Is "Disability" Under the ADA?

The ADA protects a "qualified individual with a disability" from discrimination in all aspects of employment terms and conditions. 42 U.S.C. § 12112(a).

To understand who is protected, it requires one to sort through the statutory definitions in the Act and implementing regulations of the Equal Employment Opportunity Commission (EEOC), 29 C.F.R. § 1630 (1996). The ADA defines a "*qualified individual with a disability*" as:

> **"[a]n individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires..." 42 U.S.C. § 12111(8).**

"*Disability*" is defined in three ways as:

> **(A) a physical or mental impairment that substantially limits one or more of the life activities of such individuals;**
>
> **(B) a record of such an impairment; or**
>
> **(C) being regarded as having such an impairment. 42 U.S.C. § 12102(2).**

Although the ADA provides no further definitions, the implementing regulations of the EEOC define "physical or mental impairment", "major life activities", and "substantially limits":

> **(h) *Physical or mental impairment* means:**
>
> **(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs),**

cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or

(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. 29 C.F.R. § 1630.2(h).

(i) *Major Life Activities* means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. 29 C.F.R. § 1630.2(i).

The term *substantially limits* means:

(i) Unable to perform a major life activity that the average person in the general population can perform; or

(ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity. 29 C.F.R. § 1630.2(j).

The definition of disability under the ADA mirrors that of "handicap" in the Rehabilitation Act, 29 U.S.C. § 706(a)(B). Congress selected the term "disability" for the ADA rather than "handicap", not because of any difference in meaning, but because the former term is less stigmatizing to disabled persons. S. REP. NO. 116, at 21. The legislative history of the ADA indicates that Congress intended that the relevant case law developed under the

Rehabilitation Act be applicable to the term "disability" as used in the ADA. *Bolton v. Scrivner, Inc.*, 36 F.3d 939, 943 (10th Cir. 1994).

Every other circuit court case which has dealt with the disability of alcoholism under the ADA and the Rehabilitation Act has treated, without question, or assumed, that a person suffering from the disease of alcoholism is an individual with a disability or a handicap. The very nature of the disease commands such treatment under both Acts. *Miners v. Cargill Communications, Inc.*, 113 F.3d 820 (8th Cir. 1997) ("alcoholism qualifies as a disability for the purposes of the ADA"); *Maddox v. University of Tennessee*, 62 F.3d 843 (6th Cir. 1995) (assuming that an alcoholic is an individual with a disability under the ADA); *Altman v. New York City Health and Hosp. Corp.*, 100 F.3d 1054 (2nd Cir. 1996) (assuming alcoholic covered under the ADA); *Office of the Senate Sergeant at Arms v. Office of Senate Fair Employment Practices*, 95 F.3d 1102 (Fed. Cir. 1996) ("it is well-established that alcoholism meets the definition of a disability" under both the ADA and the Rehabilitation Act); *Despears v. Milwaukee County*, 63 F.3d 635 (7th Cir. 1995) (alcoholism assumed to be a disability under the ADA and the Rehabilitation Act); *Simpson v. Reynolds Metals Co., Inc.*, 629 F.2d 1226 (7th Cir. 1980) ("individuals with current problems or histories of alcoholism or drug abuse qualify as 'handicapped individuals' under the Rehabilitation Act"); *Crewe v. United States Office of Personnel Management*, 834 F.2d 140 (8th Cir. 1987) ("there can be little doubt that alcoholism is a handicap for the purposes of the [Rehabilitation] Act"); *Tinch v. Walters*, 765 F.2d 599 (6th Cir. 1985) (holding that a recovered alcoholic is handicapped under the Rehabilitation Act); *Newland v.*

Dalton, 81 F.3d 904 (9th Cir. 1996) ("alcoholism is a recognized handicap" under the Rehabilitation Act); *Teahan v. Metro-North Commuter R.R. Co.*, 951 F.2d 511 (2nd Cir. 1991) ("it is clear that substance abuse is a 'handicap' for purposes of the Rehabilitation Act"); *Rodgers v. Lehman*, 869 F.2d 253 (4th Cir. 1989) ("alcoholism is a handicapping condition within the meaning of the [Rehabilitation] Act"); *Butler v. Thornburgh*, 900 F.2d 871 (5th Cir. 1990), cert denied, 498 U.S. 998, 111 S.Ct. 555, 112 L.Ed.2d 562 (1990) (alcoholic is a handicapped employee under the Rehabilitation Act); *Fuller v. Frank*, 916 F.2d 558 (9th Cir. 1990) (alcoholism is covered handicap under the Rehabilitation Act); *Leary v. Dalton*, 58 F.3d 748 (1st Cir. 1995) (alcoholism is a disability within the meaning of the Rehabilitation Act); *Little v. Federal Bureau of Investigation*, 1 F. 3d 255 (4th Cir. 1993) ("It is settled that alcoholism is a handicapping condition within the meaning of the [Rehabilitation] Act"); *Williams v. Widnall*, 79 F.3d 1003 (10th Cir. 1996) (alcoholic is a disabled person within the meaning of the Rehabilitation Act).

In each of these cases involving an alcoholic employee, like this case, the employee's diagnosis of alcoholism was not disputed. Further, the evidence of impairment in many of these cases is similar or even less compelling than Petitioner's evidence. For example, the Sixth Circuit, in a case decided under both the ADA and the Rehabilitation Act, accepted as evidence of disability, an employee's prior arrests for driving a motor vehicle under the influence of alcohol and public intoxication, as well as treatment for alcoholism, even though the employee's drinking never affected his ability to perform his job and he never drank on the job. *Maddox*, 62 F.3d at 845. The

Second Circuit accepted as disabled under the ADA, a physician whose alcoholism was evidenced by periodic binges and drinking sprees, occurring mainly during weekends and vacations, who had undergone treatment and appeared drunk while treating a patient. *Altman*, 100 F.3d at 1055-1059. In the Ninth Circuit, an employee attempting to fire an assault rifle at individuals in a bar during a "drunken rampage" satisfied the definition of disability under the Rehabilitation Act. *Newland*, 81 F.3d at 905.

Congressional intent to provide protection for individuals with the disability of alcoholism is clear:

> "It is not possible to include in the legislation a list of all the specific conditions, diseases, or infections that would constitute physical or mental impairments... The term includes, however, such conditions, diseases and infections as: ..... alcoholism." S. REP. 116 at 22; H.R. REP. NO. 485 at 51.

The intent to include alcoholism as a disability is further evidenced in the ADA itself which states that employers are permitted to hold an alcoholic to the same qualification standards for employment or job performance and behavior that it holds other employees, even if any unsatisfactory performance or behavior is related to the alcoholism. 42 U.S.C. § 12114(c)(4).

The EEOC, in interpreting the definition of disability, states "[A] person who is an alcoholic is an 'individual with a disability' under the ADA." EEOC Technical Assistance on Title I of ADA at IV-8.2.

Despite the clear intent of Congress, the interpretations of the EEOC and established case law, the Fifth Circuit has decided that an active alcoholic, who has lost the ability to control his drinking, getting drunk almost every night, having blackouts, suffering insomnia, and in need of inpatient hospitalization, is not substantially limited in any major life activity. The Fifth Circuit now places a second, unprecedented requirement upon this class of protected persons, to show an additional permanent impairment caused by the alcoholism. App., *infra*, 21a fn 9. No other court has required this standard for an alcoholic to be protected under either the ADA or the Rehabilitation Act.

In so doing, the Fifth Circuit set forth examples of impairments that an alcoholic could show to meet the definition of disability: permanent alterations to gait, speech, memory, or long term insomnia. App., *infra*, 21a, fn 9. The Fifth Circuit's requirement of a permanent impairment is not contained in the ADA. Further, the EEOC attaches no such requirement:

> **"[T]he duration of an impairment does not, by itself, determine whether the impairment substantially limits an individual's major life activities. It is just one factor to be considered with all of the other relevant information...**
>
> *******
>
> **" Temporary impairments may be disabilities if they take significantly longer than normal to heal and significantly restrict the performance of major life activities during the healing period. Similarly, long-term impairments, or potentially long-term impairments of indefinite duration, may be disabilities if they are severe. Chronic conditions**

that are substantially limiting when active, and conditions with a high likelihood of recurrence in substantially limiting form also are disabilities." EEOC Compliance Manual, Vol. 2 § 902.4(d).

The Fifth Circuit further held that Petitioner did not satisfy the second statutory definition of disability under the ADA as he did not have a "record of impairment." 42 U.S.C. § 12102(2)(B). In so holding, the Fifth Circuit bootstrapped their reasoning that Petitioner's alcoholism did not substantially limit any major life activity to reach the result that Petitioner's record of hospitalization for his alcoholism was not a record of a substantially limiting impairment. Further, the Fifth Circuit rejected the application of this Court's decision in *School Board of Nassau County v. Arline*, which held that an employee who suffered from tuberculosis which required hospitalization 22 years earlier established that she had a "record of an impairment" within the meaning of the Rehabilitation Act. *Arline*, 480 U.S. at 279-81. App., *infra*, 22a.

The Fifth Circuit has ignored the impairments that the disease of alcoholism insults upon its victims. Instead, it equates an alcoholic to a "social drinker", effectively removing the disability of alcoholism from the protection of the ADA. The Fifth Circuit's opinion has far reaching consequences in future ADA cases. Not only alcoholics, but recovering substance abusers and any other persons with a physical or mental impairment which does not cause permanent symptoms, will not be considered disabled. For example, this opinion would prevent an epileptic (permanent impairment) who suffers frequent seizures (temporary afflictions) from being protected under the ADA.

II. When Must An Employer Accommodate?

As part of the national mandate for the elimination of discrimination against individuals with disabilities, Congress placed an affirmative duty upon private employers. Under the ADA, the term "discriminate" includes:

> (5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; . . . 42 U.S.C §12112(b)(5)(A).

Regulations promulgated by the Department of Health and Human Services under the Rehabilitation Act require recipients of federal funds to "make reasonable accommodation to the known physical or mental limitations of an otherwise handicapped ... employee unless the recipient can demonstrate that the accommodation would impose an undue hardship ..." 45 C.F.R. § 84.12(a) (1996). The terms common to both the ADA and the Rehabilitation Act are to be interpreted the same way. *Stone v. City of Mount Vernon*, 118 F.3d 92, 96 (2nd Cir. 1997).

The EEOC's Interpretive Guidance on Title I of the ADA sets forth three categories of reasonable accommodation. These are (1) accommodations that are required to ensure equal opportunity in the application process; (2) accommodations that enable the employees with disabilities to perform the essential functions of the position held or desired; and (3) accommodations that

enable the employees with disabilities to enjoy equal benefits and privileges of employment as are enjoyed by employees without disabilities. 29 C.F.R. § 1630, App. 1630.2(o).

The Fifth Circuit's analysis of the duty to reasonably accommodate focuses only on category (2) and rejects category (3) as a reason for providing an accommodation. The Fifth Circuit holds that an employer's duty to reasonably accommodate is only triggered when the employee is unable to perform the essential functions of the job, i.e., substantially limited in the major life activity of working. App., *infra*, 16a, fn 4. This narrow view of the duty to reasonably accommodate is contrary to the intent of the ADA, as well as other circuit court cases interpreting this duty.

In *Homeyer v. Stanley Tulchin Associates, Inc.*, 91 F.3d 959 (7th Cir. 1996), the Seventh Circuit dealt with a plaintiff who suffered from chronic severe allergic rhinitis and sinusitis, which impaired her ability to breathe normally. This condition was aggravated by environmental tobacco smoke at her office. *Id.* at 960. Homeyer filed suit under the ADA claiming that after requesting an accommodation from her employer several times for her disability, she was terminated. The trial court dismissed her complaint holding that she was not a qualified individual with a disability because she was not substantially limited in the life activity of working. *Id.* at 961. The Seventh Circuit reversed the district court, holding that her chronic severe allergic rhinitis and sinusitis which was alleged to be a substantial limitation on the activity of breathing was sufficient for her case to proceed. *Id.* at 961-962. The Seventh Circuit's analysis is contrary to the analysis of the Fifth Circuit in this case:

> "It cannot be, however, that every plaintiff that merely links an existing disability to the workplace is limited to an 'ability to work' analysis, for then every 'disability' claim asserted in an action against an employer would collapse into an 'ability to work' analysis. For example, a person in a wheelchair who seeks an accommodation from his employer would have to prove that his employment opportunities were limited generally in order to establish a 'disability' under the Act; he would be unable to simply claim that his major life function of walking was substantially impaired." *Id.* at 962 fn 1.

Further, both the Seventh Circuit and the Ninth Circuit, deciding cases under the Rehabilitation Act, have held that a reasonable accommodation does not have to be tied to the employee's ability to perform the essential functions of the job.

In *McWright v. Alexander*, 982 F.2d 222 (7th Cir. 1992), the Seventh Circuit addressed the duty of an employer to provide a reasonable accommodation to an employee who could perform the essential functions of her job and was not impaired in any manner in her ability to perform her job. Plaintiff, whose childhood polio had left her with the handicap of sterility, sued her employer for discriminating against her by refusing to grant her request for child care leave on terms comparable to those given to biological mothers when she adopted a child. The Seventh Circuit reversed the trial court's dismissal, rejecting their suggestion that plaintiff's claim was defective because the accommodation she requested "was not related to any specific condition of her work." *Id. at* 227. As the court noted:

"Child-care leave is related to work in the relevant sense. The Rehabilitation Act calls for reasonable accommodations that permit handicapped individuals to lead normal lives, not merely accommodations that facilitate the performance of specific employment tasks." *Id.* at 227.

In *Buckingham v. United States*, 998 F.2d 735 (9th Cir. 1993), the Ninth Circuit addressed a similar situation. Buckingham requested a transfer from the post office in Columbus, Mississippi to one in Los Angeles in order to obtain better medical treatment for his disabling condition, AIDS. The Ninth Circuit rejected the employer's argument that Buckingham's transfer request was not a reasonable accommodation to his handicap because it was not tied to his ability to perform the essential functions of his job. In so doing, the Ninth Circuit held:

"Buckingham is not asking for a different job. Nor is he asking for a job that is not reasonably available under the postal service's existing policies (references omitted.) He is asking for the same job at a different location. It is not per se unreasonable under the Rehabilitation Act to transfer Buckingham to a location where he can obtain better medical treatment for his handicap.

"Furthermore, contrary to what the government urges, employers are not relieved of their duty to accommodate when employees are already able to perform the essential functions of the job. *Qualified handicapped employees who can perform all job functions may require reasonable*

accommodation to allow them to (a) enjoy the privileges and benefits of employment equal to those enjoyed by non-handicapped employees or (b) pursue therapy or treatment for their handicaps. In other words, an employer is obligated not to interfere, either through action or inaction, with a handicapped employee's efforts to pursue a normal life." *Id.* at 740 (emphasis added).

The Fifth Circuit's decision that an employer must only accommodate a substantially limiting impairment that interferes with the employee's ability to perform the essential functions of the job is a much narrower interpretation, leaving both employees and employers in the dark as to what their respective rights and responsibilities are under the ADA. The need for this Court to address and clarify this issue is paramount.

III. Is Leave a Reasonable Accommodation?

The ADA specifies that reasonable accommodation may include job restructuring and part- time or modified work schedules. 42 U.S.C § 12111(9)(B). Congressional intent for leave as a form of reasonable accommodation under the ADA is clear from the legislative history of both the House of Representatives and the Senate. The House Report provided that "[R]easonable accommodation may also include providing additional unpaid leave days, if such provision does not result in an undue hardship for the employer." H. REP. No. 485 at 63. The Senate Report makes only one reference to employee leave in terms of reasonable accommodation. It states that employers are not obligated to give disabled employees *more paid leave* than other employees. S. REP. No. 116 at 31.

The EEOC recognizes leave as a form of reasonable accommodation. "Accommodations could include permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment...". 29 C.F.R. 1630, App. § 1630.2(o).

Despite the language of the ADA, the clear intent of Congress, and the interpretative guidance provided by the EEOC, the Fifth Circuit held that Petitioner failed to request a cognizable, reasonable accommodation as he never requested Respondent to change any aspect of his job. App., *infra*, 25a- 26a.

The Fifth Circuit's opinion is in direct conflict with the opinion of the Federal Circuit in *Office of the Senate Sergeant at Arms v. Office of Senate Fair Employment Practices*, 95 F.3d 1102 (Fed. Cir. 1996). In a case decided under the ADA, the Federal Circuit held that providing an alcoholic leave to obtain in-patient treatment and allowing him to perform his job on a restricted-duty status while he continued his recovery, was a reasonable accommodation. In so holding, the court stated "[T]reatment would seem to be essential to any accommodation for alcoholism. *Id.* at 1107.

Cases decided under the Rehabilitation Act are in conflict as well. See *Fuller v. Frank*, 916 F.2d 558 (9th Cir. 1990) (post office had reasonably accommodated an alcoholic employee by granting leave for treatment); *Rodgers v. Lehman*, 869 F.2d 253 (4th Cir. 1989) (leave for treatment is a reasonable accommodation for an alcoholic employee).

The Fifth Circuit's reasoning that Petitioner did not request an accommodation, he only requested to return to

his position as he left it when he entered treatment, ignores the obvious. Leave for treatment necessarily implies being able to return after the treatment is complete. This is a form of reasonable accommodation contemplated by the ADA.

IV. The Decision is Erroneous

The Fifth Circuit's archaic view of the disease of alcoholism and its treatment of an alcoholic in this case is clearly erroneous. This opinion ignores the clear mandate of the ADA:

> "Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. § 790 et seq.) or the regulations issued by Federal agencies pursuant to such title." 42 U.S.C. § 12201.

Nevertheless, this case does just that. The Fifth Circuit, in a major departure from established precedent, has opined a lesser standard of protection for individuals with the disability of alcoholism in the private sector than is set forth for the federal sector.

Alcoholism is a permanent condition which, when reaches the stage that Petitioner's had, substantially limits its victim's major life activities and ability to enjoy life. Alcoholics in the workforce, as a general rule, primarily need one thing-leave for treatment. Provided it does not present an undue burden to the employer, which was not asserted in this case, this is a reasonable request which has the end result of improving the employee to the

benefit of the employer. The Fifth Circuit's opinion ignores the clear language of the ADA, the intent of Congress and prior case law, presenting an intolerable setback to a class of persons intended to be protected under the Act.

V. The Questions Presented are Important.

The majority of the cases litigated under the ADA revolve around the interpretation of the definition of disability.[3] This case gives this Court the opportunity to address and resolve the dilemmas faced by employers and employees in deciding who is entitled to protection under the Act.

Further, six to ten percent of any employee population in the United States is estimated to suffer from the disease of alcoholism.[4] Many of the cases brought under the ADA have dealt with alcoholics or recovering substance abusers. The intent of Congress not to exclude this class of persons from the ADA is clear. However, the Fifth Circuit's opinion does just that by requiring a permanent secondary impairment. This Court should resolve the uncertainty created by this case.

Finally, the Fifth Circuit's opinion restricts the right of individuals with disabilities to seek and obtain a reasonable accommodation from their employer. The

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[3] Wendy Wilkinson, Judicially Crafted Barriers To Bringing Suit Under the Americans With Disabilities Act, 38 S. Tex. L. Rev. 907 (1997).

[4] Wendy K. Voss, Note, Employing the Alcoholic Under the Americans With Disabilities Act of 1990, 33 Wm. & Mary L. Rev. 895, 902 (1992).

need for clarification from this Court is crucial.

In sum, this case now puts the courts in significant disagreement on matters of importance to the courts and to the American workforce. This case presents a rare opportunity for this Court to address the most disputed and litigated sections of the ADA and to bring much needed certainty and uniformity to this area. Accordingly, the Court should grant the Petition.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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REVISED, August 4, 1997

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 95-10990

ROBERT P. BURCH,

Plaintiff-Appellee,
Cross-Appellant,

versus

COCA-COLA, CO.,

Defendant-Appellant,
Cross-Appellee,

Appeals from the United States District Court for the Northern District of Texas

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July 30, 1997

Before GARWOOD, WIENER and DEMOSS, Circuit Judges.

GARWOOD, Circuit Judge:

Plaintiff-appellee, cross-appellant Robert P. Burch (Burch) brought this suit under the Americans with Disabilities Act (ADA) asserting that his termination by his employer defendant-appellant, cross-appellee Coca-Cola Co. was in violation of the ADA. Burch also advanced Texas law claims of intentional infliction of emotional distress and defamation. The trial court granted Coca-Cola's motion for summary judgment on the state law claims and granted judgment as a matter of law for Coca-Cola on the ADA intentional discrimination claim. The jury returned a verdict in favor of Burch on the ADA reasonable accommodation claim. Coca-Cola appeals the denial of its motion for judgment as a matter of law on the reasonable accommodation claim. Burch cross appeals the judgment as a matter of law on his intentional discrimination claim and the summary judgment on his defamation claim. We hold that Coca-Cola was entitled to judgment as a matter of law on both the intentional discrimination and the reasonable accommodation ADA claims, and that summary judgment was properly awarded to it on the defamation claim.

Facts and Proceedings Below

Burch, a former management-level employee of Coca-Cola, brought this suit against his former employer under the ADA. Burch, a recovering alcoholic, alleged that Coca-Cola terminated him because of his alcoholism and, alternatively, failed to accommodate his disability by terminating him instead of permitting him to return to work after he successfully completed a rehabilitation program.

Coca-Cola recruited Burch in mid-1989. At that time, Burch was a twenty-four-year veteran of the General Electric Company having achieved some success in various management positions. Burch commenced his employment with Coca-Cola in July 1989 as an area service manager for the company's Fountain Division. Coca-Cola assigns service responsibility by geographic area, dividing the country into several regions. As the area service manager for the southwest region, Burch was responsible for managing Coca-Cola's service network for a region that included all of Texas and stretched from North Dakota to Colorado and from Mississippi to parts of Arizona. He directly supervised approximately twenty Coca-Cola employees.

Burch's tenure with Coca-Cola was largely without incident and he was evaluated consistently as a manager who met requirements in a satisfactory manner. In 1991, Coca-Cola recognized Burch as the Area Service Manager of the Year. In July 1993, Burch received his highest overall evaluation score--an "M.E."----which signified that Burch "met or exceeded" goals. Burch's evaluations, however, reflect that "working relationships" was a "developmental area" for him. Burch was never formally reprimanded for improper behavior prior to his termination in November 1993.

In May 1992, Burch sought, and began receiving, counseling pursuant to Coca-Cola's Employee Assistance Program (EAP). Counseling pursuant to Coca-Cola's EAP is confidential; counselors are not permitted to notify Coca-Cola of the matters discussed or the name of the particular employee seeking counseling. Clinical social worker Cynthia Maddox, an EAP-provided counselor, saw Burch from May 29, 1992, until August 31, 1992, and

again on February 3, 1993. Burch and Maddox primarily discussed relationship problems Burch was having with his then-current girlfriend. Burch, who has been married four times, was troubled with his inability to have lasting personal relationships. Although Maddox did not treat Burch for alcohol abuse, she noted a possible alcohol problem.

On February 3, 1993, Burch requested a psychiatric referral from Maddox. Maddox referred Burch to Dr. Joel Holiner, a psychiatrist in private practice, after concluding that Burch was exhibiting "obsessive, compulsive, and paranoid" behavior.

Burch saw Dr. Holiner in February 1993. Dr. Holiner diagnosed Burch as suffering from "adjustment disorder with depressed mood" and "probable alcohol abuse." Dr. Holiner in turn referred Burch to Dr. Marcelo Matamoros, a psychotherapist in private practice, for additional therapy. Dr. Matamoros began treating Burch several days after his referral, also in February 1993.

Burch testified that throughout this time he was drinking heavily during his off hours, routinely drinking eight or ten beers in the evening. Burch also testified that, although he never drank during working hours, he experienced hangover-like symptoms in the mornings and attempted to isolate himself from interaction with people. Burch would close his office door and complete paperwork in the morning to avoid contact with other Coca-Cola employees, explaining that he "wasn't a morning person."

Although Burch had been a regular drinker since age fourteen, he testified at trial that he believed his tenure at

Coca-Cola exacerbated his problems with alcohol. Burch testified that alcohol was served regularly at Coca-Cola functions and that he drank regularly with both his peers and supervisors during business trips. The Coca-Cola "culture," as characterized by Burch, amounted to a fraternity of drinkers and contributed to his alcoholism. Burch testified that at his first Coca-Cola meeting in 1989, his supervisor, Bill Speer, called for an afternoon "beer break" instead of a coffee break. Similarly, Burch claimed that company-sponsored cocktail hours were common and that managers typically frequented bars and cocktail lounges after area service managers meetings.

Bill Speer was replaced as Burch's supervisor by Jose Smith, a man who Burch claimed had an exceedingly aggressive management style. Burch experienced no problems with his professional working relationship with Smith and no testimony was presented concerning any contact between Burch and Smith outside of their respective professional responsibilities. Smith's evaluations of Burch were unremarkable; Burch was rated as a competent area service manager with no noted problems of any significance.

Burch's third supervisor, Perry Cutshall, replaced Smith after approximately two years in 1991. Burch testified that he "tried real hard to build a relationship" with Cutshall, regularly drinking with him in Atlanta after monthly area service managers meetings. Burch further testified that Cutshall had been intoxicated on at least one occasion and that drinking after the meetings was "part of the protocol." Burch contended at trial that he informed Cutshall in 1992 that he had sought EAP counseling, but did not specify that he was concerned about an alcohol problem.

Burch also testified that he drank extensively with his fellow area service managers George Hawkins and Jerry Allen, although he contended that he curtailed his social drinking after he entered counseling with Maddox in 1992. Burch testified that he believed that Hawkins and Allen----whom he considered to be close social friends of Cutshall----ostracized him in 1992 when he stopped drinking with them after meetings and on business trips. Burch admitted, however, that Cutshall recommended him for two positions that would have been considered promotions after the perceived ostracism began in May 1992.

The only testimony concerning inappropriate conduct on the job by Burch prior to September 1993 was an incident involving a Coca-Cola customer service representative, Lajuanna Ajayi, in March 1993. The incident involved a McDonald's restaurant that had been without fountain service for an extended period. After unsuccessful attempts to reach an intermediate service manager, Ajayi contacted Burch directly by pager. Although the precise facts were contested at trial, it was established that Burch, who was in Toronto, was short with Ajayi when he answered the page. Ajayi complained to her supervisors, who in turn reported the incident to Cutshall. Cutshall spoke with Burch about the incident in Atlanta shortly after it occurred. Burch apologized to Ajayi but no formal reprimand was made by Cutshall.

The events leading up to Burch's termination began at a September 22, 1993, area service mangers meeting in Atlanta. The meeting, at which approximately thirty-five Coca-Cola managers from around the country were in attendance, was held in a warehouse in Dunwoody, Georgia, a suburb north of Atlanta. The meeting lasted all

day, with presentations from Coca-Cola managers concerning various procedures and developments affecting the fountain division. Burch testified that, during the meeting, Allen and Hawkins made repeated derogatory comments about him. Burch's version of the events of the meeting were largely corroborated by the participants. There was testimony to the effect that joking and bantering between the managers was routine, although Burch testified that the disruptions at the meeting were exceptional. At the time of the September 1993 meeting, Allen was assigned to a position at the customer communications center that was roughly equivalent to Burch's status as an area service manager. Hawkins was Allen's superior.

After the meeting concluded that afternoon, the participants went to the Dunwoody Holiday Inn for a reception honoring Max Trowbridge, who was the outgoing area service manager for New York and was transferring to Coca-Cola's Integrated Operating Systems (IOS) division. According to Burch, Trowbridge's transfer was not an advancement, but rather a result of his poor performance as an area service manager. The evening event commenced at six o'clock and began with a cocktail hour in a reception room at the hotel. Burch testified that he had had several drinks, but did not become intoxicated. Dinner was also served in the reception room.

Burch testified that Trowbridge, while addressing the group, said that Burch was "a good candidate for" IOS. Burch took offense at this comment, which he considered to be an attack on his competence.[1] Burch further

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[1] Brady Lum, a manager affiliated with IOS, testified that he interpreted the remarks as a compliment.

testified that Hawkins rejoined with "Perry would enjoy that," referring to Burch's supervisor Cutshall. The room laughed at the remarks and Burch turned to face the table at which Allen, Hawkins, and Cynthia Bilbo[2] were sitting. Because Hawkins's back was toward Burch, Burch pointed at Allen and mouthed "fuck you" twice and "get off my ass." Burch, as he admitted, at the same time also motioned with his head for Allen to meet him outside the room. Burch testified that, throughout the exchange, Allen kept laughing. Burch----who is some 6'5" tall, weighed about 223 pounds, and biked some 100 to 200 miles a week----admitted that he had then been "red in the face" and "very angry," but stated that he never left his chair and never intended to engage in any physically violent behavior. After the episode, a manager seated at Burch's table, Mike Memoli, told Burch to calm down. Burch remained seated at his table for the remainder of the dinner without incident.

Burch testified that Hawkins apologized to him after dinner for the remarks he had made throughout the day at the meeting and at the dinner. Cutshall was not aware that the episode had occurred until after the dinner was over.[3] Cutshall and Burch did not speak about the

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[2] There was testimony to the effect that Bilbo was among the group during the afternoon meeting that had made antagonistic comments toward Burch. In September 1993, she was assigned to the customer communications center and reported directly to Allen. The jury heard testimony that both at the time of the incident and during the trial Bilbo had a romantic relationship with Cutshall.

[3] Bilbo testified that she informed Cutshall as the

incident at the following day's meeting. Burch returned to Dallas the evening of September 23, 1993.

Upon his return to Dallas, Burch attempted to contact Dr. Matamoros, who was out of town. Burch spoke with the counselor on duty who recommended consultation with a psychiatrist because of the severity of Burch's depression and described alcohol abuse.

The following afternoon, September 24, 1993, Burch learned from John Barker, an area service manager from St. Louis who had also attended the dinner in Atlanta, that the Coca-Cola human resources department was investigating Burch's conduct at the dinner. Burch testified that he attempted unsuccessfully to contact Cutshall on Friday to discuss the incident.

On Saturday, September 25, 1993, Burch spoke with Cutshall, who informed him of the pending human resources investigation. Cutshall directed Burch to discuss his version of the incident with Frank Tola, who was to lead the investigation. Burch told Cutshall for the first time that he was experiencing problems with alcohol abuse and that he intended to undergo treatment at Charter Hospital in Dallas. Burch testified that he spoke with several managers on Saturday who had attended the

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dinner was breaking up. Cutshall testified that he spoke with Allen and Hawkins to get their versions later that evening. Cutshall spoke with Lum about the incident the next day, September 23, 1993. The evening of September 22, 1993, Cutshall also learned of an earlier incident between Burch and another Coca-Cola manager, James Britton.

Atlanta meeting and dinner concerning the incident and its severity.

On Sunday, September 26, 1993, Burch was admitted voluntarily to Charter Hospital. Dr. Edgar Nace was Burch's treating physician, who admitted Burch on an in-patient basis. Burch remained at Charter Hospital until October 6, 1993, at which point he became a day patient. Burch then contacted Cutshall and requested to return to work on a part-time basis. Cutshall informed Burch that he could not return as he was on suspension pending completion of the human resources investigation. Burch remained on full salary throughout his treatment (which was paid for by Coca-Cola's benefit plan) and until his termination.

On October 27, 1993, Burch sent a letter to Tola requesting to "return to work immediately." Letters from Dr. Nace and Dr. Matamoros were also then forwarded to Tola attesting to Burch's readiness to return to work at Coca-Cola. In a memorandum dated October 27, 1993, Tola recommended that Burch be discharged for his behavior at the dinner. Tola's recommendation was supported by six Coca-Cola managers.

Tola asked Burch to return to his office in Dallas on November 4, 1993. Upon his arrival he was met by Tola and Cutshall, who informed Burch that he was terminated from his employment with Coca-Cola for "performance issues." Burch was asked to return all company property and was escorted off the premises by an off-duty police officer.

The following Monday, Burch went to the offices of Drake, Beam & Morin, a placement firm used by

Coca-Cola. During his visit, Burch testified that he was met by an employee who wanted reassurances that Burch would not behave improperly while in the Drake, Beam & Morin offices. Burch further testified that the questions were a result of a facsimile received from Coca-Cola stating that Burch had been terminated for "violent and threatening behavior." Burch left the offices.

Since his termination from Coca-Cola, Burch has held two subsequent managerial jobs. The first, a $115,000 a year management position with Bell Packaging in Michigan, lasted from April to September 1994, when he was terminated for a conflicting management style. The second, a $60,000 a year management position with Montgomery Ward in Dallas, ended after several months when Burch resigned in lieu of termination.

Burch filed suit in state court in Dallas County, Texas, alleging that he had been terminated in violation of the ADA and asserting state law claims of defamation and intentional infliction of emotional distress. Coca-Cola removed the action to the United States District Court for the Northern District of Texas (Dallas Division). Pursuant to 28 U.S.C. § 636(c), the parties consented to trial before a magistrate judge.

Coca-Cola filed a motion for summary judgment on all claims. After Burch's response was filed, the magistrate judge issued a memorandum order granting summary judgment in favor of Coca-Cola on the Texas law defamation and intentional infliction of emotional distress claims and denying summary judgment on Burch's ADA claims.

The case was tried before a jury in Dallas. At the close of Burch's evidence, Coca-Cola made a motion for judgment as a matter of law pursuant to Rule 50. The magistrate judge granted the motion on the ADA intentional discrimination claim but denied the motion on the ADA reasonable accommodation claim. Coca-Cola's renewed motion (on the reasonable accommodation claim) at the close of all the evidence was denied.

The jury returned a verdict in favor of Burch, finding that Coca-Cola terminated Burch in violation of the ADA. The jury awarded Burch $109,000 in backpay, $700,000 in front pay, $300,000 in compensatory damages, and $6,000,000 in punitive damages. Coca-Cola moved for judgment as a mater of law or, in the alternative, for a new trial.

The magistrate judge denied Coca-Cola's motion and entered judgment for Burch. The magistrate judge reduced the front pay award to $294,777 (representing the discounted value of five years front pay), reduced the punitive damage award to zero, and awarded Burch attorneys' fees of $208,072. Coca-Cola renewed its motion for judgment as a matter of law or a new trial. The magistrate judge denied Coca-Cola's motion.

Coca-Cola has appealed. It asserts that the magistrate judge erred by denying its motion for judgment as a matter of law on the ADA reasonable accommodation claim, by denying its motion for a new trial, and by awarding an excessive amount of compensatory damages. Burch has cross appealed. He asserts that the magistrate judge erred by granting Coca-Cola summary judgment on his Texas law defamation claim and by granting

Coca-Cola's motion for judgment as a matter of law on his ADA intentional discrimination claim.

Discussion

Both parties appeal from the magistrate judge's rulings on Coca-Cola's Rule 50 motions for judgment as a matter of law. This Court reviews de novo rulings on Rule 50(a) and (b) motions, using the same standards as those to be employed by the trial court. RTC v. Cramer, 6 F.3d 1102, 1109 (5th Cir. 1993).

After a party has been fully heard on an issue, a trial court may grant an opposing party's motion for judgment as a matter of law if "there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." Fed. R. Civ. P. 50(a)(1). In such circumstances, we view the entire trial record in the light most favorable to the non-movant, drawing reasonable factual inferences in its favor. Conkling v. Turner, 18 F.3d 1285, 1300 (5th Cir. 1994). "'The 'decision to grant a directed verdict . . . is not a matter of discretion, but a conclusion of law based upon a finding that there is insufficient evidence to create a fact question for the jury.'" Id. at 1300-01 (quoting In re Letterman Bros. Energy Sec. Litig., 799 F.2d 967, 972 (5th Cir. 1986), cert. denied, 107 S.Ct. 1373 (1987)). "If the facts and inferences point so strongly and overwhelmingly in favor of the moving party . . . that reasonable jurors could not have arrived at a contrary verdict, then we will conclude that the motion should have been granted." Cramer, 6 F.3d at 1109 (5th Cir. 1992) (citing Boeing v. Shipman, 411 F.2d 365, 374 (5th Cir. 1969) (en banc)).

I. Reasonable Accommodation

"'The ADA is a federal antidiscrimination statute designed to remove barriers which prevent qualified individuals with disabilities from enjoying the same employment opportunities that are available to persons without disabilities.'" Taylor v. Principal Fin. Group, Inc., 93 F.3d 155, 161 (5th Cir.) (quoting 29 C.F.R. § 1630, App. (1995)), cert. denied, 117 S.Ct. 586 (1996). In order to achieve this goal, the ADA prohibits----as a form of discrimination----an employer's failure to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless [an employer] can demonstrate that the accommodation would impose an undue hardship." 42 U.S.C. § 12112(b)(5)(A) (1995).

The ADA, its implementing regulations, and the EEOC's interpretive guidance make clear that an employer's obligation to provide a "reasonable accommodation," when triggered, contemplates changes to an employer's procedures, facilities, or performance requirements that will permit a qualified individual with a disability to perform the essential functions of his or her job. In all cases a reasonable accommodation will involve a change in the status quo, for it is the status quo that presents the very obstacle that the ADA's reasonable accommodation provision attempts to address. The ADA provides:

"The term 'reasonable accommodation' may include--

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities." 42 U.S.C. § 12111.

In addition to repeating the examples of reasonable accommodations set forth in the statute, the regulations define the term as "[m]odifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position." 29 C.F.R. § 1630.2(o)(1)(ii) (1996). The EEOC's interpretive guidance also emphasizes the protean nature of the employer's obligation. See 29 C.F.R. § 1630, App. (1996) ("In general, an accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities.").

We conclude that this case was improperly tried on a reasonable accommodation theory. First, Burch failed to establish that his alcoholism interfered in any way with his ability to perform the essential functions of an area service manager for Coca-Cola without reasonable accommodation or, for that matter, that his alcoholism ever substantially impaired any major life activity. Second, Burch failed to establish that he ever requested any modification or adjustment to his job as an area service manager with Coca-Cola. A wrongful termination claim under the ADA is not properly analyzed under a reasonable accommodation theory unless an employer is

shown to have terminated a qualified individual with a disability in order to avoid accommodating that employee's impairments at the workplace. Accordingly, an employee who requests only the opportunity to return to an unmodified, previously-held position fails to state a cognizable claim under 42 U.S.C. § 12112(b)(5).

A. Burch's Limitation

"[T]he ADA requires employers to reasonably accommodate limitations, not disabilities." Taylor, 93 F.3d at 164. This is a critical distinction, because the existence vel non of a disability or impairment is material to a reasonable accommodation claim only insofar as it limits an employee's ability to perform his or her job. Id.[4] ("Thus, while a given disability may limit one employee (and therefore necessitate a reasonable accommodation), it may not limit another."); see also Beck v. University of Wisc. Bd. of Regents, 75 F.3d 1130, 1135 (7th Cir. 1996) ("It is plain enough what 'accommodation' means. The employer must be willing to consider making changes in its ordinary work rules, facilities, terms, and conditions in

[4] Burch argues that "to be protected under the ADA, an individual need only show that a major life activity is substantially limited; there is no requirement that the individual also show that he is limited in the activity of working as well." This is true insofar as Burch may assert a claim for intentional discrimination under the ADA. To assert a discrimination claim under the reasonable accommodation provision, however, Burch must demonstrate that a substantially limiting impairment somehow affected his ability to perform his job. Without such a showing, there would be nothing for an employer to accommodate.

order to enable a disabled individual to work.") (quotation omitted). Accordingly, an impairment must be substantially limiting at the time of the requested accommodation. See Pritchard v. The Southern Co. Servs., 92 F.3d 1130, 1133 (11th Cir. 1996); Muller v. Automobile Club of S. Ca., 897 F.Supp. 1289, 1295-96 (S.D. Ca. 1995).

The ADA defines "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111. The ADA further defines an actionable disability, in relevant part, as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." Id. § 12102(2)(A). "Physical or mental impairment,"[5] "substantially limits,"[6] and "major life activities"[7] are all defined in the applicable regulations.

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5 "(h) Physical or mental impairment means:

(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or

(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." 29 C.F.R. §1630.2(h) (1996).

6 "(j) Substantially limits--(1) The term

Coca-Cola contends that Burch failed to establish that he was a qualified individual with a disability as required by the ADA. In response, Burch makes a number of arguments in support of his assertion that his alcoholism made him a "qualified individual with a disability." The first, briefly stated, is that Dr. Nace, Burch's expert, said it did. The relevant testimony of Dr. Nace is as follows:

"Q. I want to read to you the definition of disability under the Americans with Disabilities Act. It says, 'The term disability means with respect to an individual a physical or mental impairment that substantially limits one or more of the major life activities of such individual.' Using that definition is an alcoholic disabled?

A. Yes.

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substantially limits means:

(i) Unable to perform a major life activity that the average person in the general population can perform; or

(ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity." Id. § 1630.2(j).

[7] "(i) Major Life Activities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." Id. § 1630.2(i).

Q. In your opinion does Bob fit the definition of disabled under he [sic] Americans with Disabilities Act?

A. Yes, I think so."

Dr. Nace's testimony, even as Burch's treating physician, sheds no light on the individualized inquiry required by the ADA. Dr. Nace testified only in general terms about alcoholics as a class. The only testimony given by Dr. Nace concerning Burch individually concerned Burch's ability to function without limitation.[8] As the EEOC's interpretive guidance makes plain, the ADA does not attempt to set forth a laundry list of impairments that are disabilities. See 29 C.F.R. § 1630, App. (1996) ("The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual. Some impairments may be disabling for particular individuals but not for others . . . ."). Unlike HIV infection, the EEOC has not attempted to classify alcoholism as a per se disability, and we decline to adopt such a questionable position. See id.; Foreman v. The Babcock & Wilcox Co., No. 96-60510 (5th Cir. July 10, 1997)(employee's heart condition with surgically implanted pacemaker did not substantially limit the major life activity of working); Robinson v. Global Marine Drilling Co., 101 F.3d 35, 37

[8] Dr. Nace agreed that by mid-October 1993 Burch would have been "a better employee than he was before," and "a more productive and improved employee." On cross-examination, Dr. Nace acknowledged that Burch's status as a recovering alcoholic did not affect his ability to walk, sit, hear, work, or participate in any "usual activities."

(5th Cir. 1996) (asbestosis sufferer who experienced episodic shortness of breath due to a reduced lung capacity was not substantially limited in the major life activity of breathing); Oswalt v. Sara Lee Corp., 74 F.3d 91, 92 (5th Cir. 1996) ("'[h]igh blood pressure, alone, without any evidence that it substantially affects one or more major life activities, is insufficient to bring an employee within the protection of the ADA'"); Dutcher v. Ingalls Shipbuilding, 53 F.3d 723, 726 & n.11 (5th Cir. 1995) (evidence of a partially crippled arm insufficient to meet the standard of substantially limiting a major life activity); see also McKay v. Toyota Motor Mfrg., USA, Inc., 110 F.3d 369, 372 (6th Cir. 1997)(diagnosed "carpal tunnel syndrome" did not substantially limit the major life activity of working); Soileau v. Guilford of Maine, Inc., 105 F.3d 12, 15 (1st Cir. 1997) (employee's dysthymia, a chronic depressive disorder, did not substantially limit the assumed major life activity of "get[ting] along with others").

Second, Burch makes reference to his testimony that his ability to walk, talk, think, and sleep were affected when he drank too much. Burch also testified that he had hangovers in the morning that affected his memory. That Burch's inebriation was temporarily incapacitating is not determinative. Burch produced no evidence that the effects of his alcoholism-induced inebriation were qualitatively different than those achieved by an overindulging social drinker: in both situations, the natural result of overindulgence is the temporary impairment of senses, dulled reactions, and the prospect of a restless sleep followed by an unpleasant morning. Although Burch's alcoholism assuredly affected how he lived and worked, "far more is required to trigger coverage under § 12102(2)(A)." Ellison v. Software

Spectrum, 85 F.3d 187, 191 (5th Cir. 1996). Burch's testimony that his inebriation was frequent does not make it a permanent impairment. Permanency, not frequency, is the touchstone of a substantially limiting impairment. Although Burch's alcoholism may have been permanent, he offered no evidence that he suffered from any substantially limiting impairment of any significant duration.[9] We have previously rejected attempts to transform temporary afflictions into qualifying disabilities. See Rogers v. International Marine Terminals, Inc., 87 F.3d 755, 759 (5th Cir. 1996); Rakestraw v. Carpenter Co., 898 F. Supp. 386, 390 (N.D. Miss. 1995); see also Soileau v. Guilford of Maine, Inc., 105 F.3d 12, 16 (1st Cir. 1997); Sanders v. Arneson Products, Inc., 91 F.3d 1351, 1354 (9th Cir. 1996), cert. denied, 117 S.Ct. 1247 (1997); 29 C.F.R. § 1630.2(j), App. (1996) ("[T]emporary, non-chronic impairments of short duration, with little or no long term or permanent impact, are usually not disabilities.").

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[9] This is not to say that an alcoholic can never demonstrate a substantially limiting impairment. But where, as here, an alcoholic's only proffered impairments are the primary result of temporary inebriation, such proof is insufficient. Burch offered no testimony that his alcoholism-induced inebriation permanently altered his gait, his ability to speak properly, his memory when sober, or produced long-term insomnia. In fact, when Burch began treatment for his alcoholism in late September 1993, he reported to Charter Hospital that he had been bicycling recreationally between 100 and 200 miles a week. Burch concedes that, prior to his paid leave to undergo treatment, his work was unaffected by his alcoholism. Burch testified that he never drank during working hours

Third, Burch argues that "[t]he fact that Burch ultimately had to be hospitalized establishes that his alcoholism substantially limited his major life activities." For this proposition, Burch relies upon School Bd. of Nassau County v. Arline, 107 S.Ct. 1123, 1127 (1987), a Rehabilitation Act case involving a claimant suffering with an acute form of tuberculosis so severe that it required hospitalization. In Arline, the Supreme Court, describing the effect the plaintiff's tuberculosis had on her respiratory system, observed, "[t]his impairment was serious enough to require hospitalization, a fact more than sufficient to establish that one or more of her major life activities were substantially limited by her impairment." Id. (noting that her hospitalization established a record of impairment under the Rehabilitation Act).

The quoted language from Arline cannot be construed to obviate the requirement, explicit in the ADA and its implementing regulations, that purported conditions be examined to ascertain whether a specific condition substantially limited a major life activity. The ADA requires an individualized inquiry beyond the mere existence of a hospital stay. Although the Court in Arline noted that the plaintiff's hospitalization established a record of impairment, the defendant had conceded that her acute tuberculosis had been substantially limiting. Indeed, the defendant's position in Arline was not that the plaintiff was not "handicapped," but rather that her contagious disease----tuberculosis----was a threat to the health of others (and therefore precluded liability for termination on that basis). To accept Burch's reading would work a presumption that any condition requiring temporary hospitalization is disabling----a presumption that runs counter to the very goal of the ADA. See Ellison,

85 F.3d at 190-91 (plaintiff who worked a modified schedule during radiation treatment for breast cancer had failed to establish a substantially limiting impairment under the ADA); Demming v. Housing and Redev. Auth., 66 F.3d 950, 955 (8th Cir. 1995) (rejecting plaintiff's position that, under Arline, proof of hospitalization for thyroid cancer established a disability under the Rehabilitation Act); Sanders, 91 F.3d at 1354 (psychological impairment requiring treatment and precluding work for three and a half months "not of sufficient duration to fall within the protections of the ADA as a disability"); Taylor v. United States Postal Service, 946 F.2d 1214, 1217 (6th Cir. 1991) (Arline should not be read "as establishing the nonsensical proposition that any hospital stay is sufficient to evidence a 'record of impairment'" under the Rehabilitation Act); Coghlin v. H.J. Heinz Co., 851 F. Supp. 808, 813 (N.D. Tex. 1994) (Arline's analysis did not address the "substantially-limits" portion of disability under the ADA).

Fourth, Burch contends that his impairment must be viewed without regard to "mitigating measures." The EEOC's interpretive guidance does state that "[t]he existence of an impairment is to be determined without regard to mitigating measures such as medicines, or assistive or prosthetic devices." 29 C.F.R. § 1630.2(h), App. (1996). Even assuming, however, that Burch's treatment for alcoholism was the equivalent to a diabetic's insulin dose----a proposition neither supported by the record nor judicially noticeable----we note that Burch failed to establish that his untreated alcoholism substantially limited any major life activity or that he required any continuing treatment whatsoever after he completed the rehabilitation program at Charter. Cf.

Harris v. H&W Contracting Co., 102 F.3d 516, 522-23 (11th Cir. 1996) (finding material issue of fact existed as to whether employee with Grave's disease was substantially limited where there was evidence that prior overdosage of thyroid medication produced "panic attack" and that withdrawal of medication would cause coma and death).

Burch admonishes the Court that if his successful completion of rehabilitation precludes him from recovery under the ADA we will produce "the anomalous result of affording protection for alcoholics who continue to drink, but not for those who are recovering." Not so. It is not difficult to imagine the myriad types of health problems, both physical and mental, that continue to plague even recovering alcoholics. Under different circumstances----and additional evidentiary support----an alcoholic may establish the need for reasonable accommodation of an alcoholism-induced impairment. Burch simply has not done so; there is insufficient evidence in the record to support a jury finding that Burch ever suffered a substantial impairment of a major life activity, much less that he did so on or after October 27, 1993. Although Burch's alcoholism would not necessarily preclude him from asserting reasonable accommodation rights under the ADA, it plainly does not excuse his failure to meet the statutory prerequisites.[10]

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[10] Burch discerns in the ADA's legislative history a congressional intent to assist recovering alcoholics. Burch draws this conclusion principally from Congress's decision not to exempt alcoholics in 42 U.S.C. § 12114 as it had current users of illegal drugs. The decision not to exclude alcoholics peremptorily, however, is far from a decision to confer disabled status without the inquiry prescribed by the ADA. Congress has been especially

B. Requested Accommodation

In addition to Burch's failure to establish that he was a qualified individual with a disability, his failure to request a cognizable, reasonable accommodation also demonstrates the magistrate judge's error in submitting this case to the jury on a reasonable accommodation theory.

As set forth above, the ADA contemplates modifications or adjustments to an employer's procedures, facilities, or, perhaps, performance requirements to enable a disabled employee to accomplish his or her job. Burch never requested Coca-Cola to change any aspect of his job. To the contrary, Burch has contended consistently that he required no job concessions----that he was in every way fit to return to precisely the same position, the same responsibilities, the same schedule, the same supervisor, and even the same office that he had prior to his treatment at Charter.

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reluctant to confer privileges on the basis of alcoholic status alone. See, e.g., Contract with America Advancement Act of 1996, Pub. L. No. 104-121, § 105, 110 Stat. 847, 852-55 ("An individual shall not be considered to be disabled for purposes of this title if alcoholism or drug addiction would (but for this subparagraph) be a contributing factor material to the Commissioner's determination that the individual is disabled.") (denying Social Security disability benefits to alcoholics). Wherever Congress's sympathies lie, we find no evidence in the legislative history or elsewhere of a congressionally conferred exemption for alcoholics from the rigors of the scheme set forth in the ADA.

Burch contends that Coca-Cola refused to provide him a reasonable accommodation on two separate occasions. First, he argues, Coca-Cola "refused Burch's request that he return to work part-time while he was still in treatment." We may dispose of this first contention of Burch's with dispatch. Although the jury was instructed as to an employer's reasonable accommodation obligations under the ADA, it was asked only: "Was Plaintiff Robert Burch terminated by Defendant The Coca-Cola Company in violation of the ADA?" The reasonableness of Coca-Cola's accommodation to Burch on October 6, 1993,----to retain him on full salary while he completed his treatment at Charter rather than take him back on a part-time basis----was not an issue that was before the jury.[11] There is no record evidence that

[11] Even had Burch tried this case on the theory that Coca-Cola's refusal to permit him to return to work on a part-time basis on October 6, 1993, was a failure to provide a reasonable accommodation, which he did not, we have substantial doubt that Coca-Cola's decision to retain him on suspension with full pay was not a reasonable accommodation. Other courts have found that unpaid leave granted to an employee undergoing treatment can be a reasonable accommodation, see Myers v. Hose, 50 F.3d 278, 283 (4th Cir. 1995) ("Requiring paid leave in excess of an employee's scheduled amount would unjustifiably upset the employer's settled budgetary expectations, and thus cannot be considered a reasonable accommodation."), and that in some circumstances an employer may have no obligation to provide even unpaid leave, see Hudson v. MCI Communications, 87 F.3d 1167, 1169 (10th Cir. 1996) (holding that unpaid leave of indefinite duration is not a reasonable accommodation). Certainly, Coca-Cola was not forced to create a part-time position if the essential functions of the area service

Coca-Cola terminated Burch because he could not return to work earlier than October 27, 1993, when he requested to return to work on a full-time basis. And, no evidence was introduced to support any damage award on a claim of failure to allow return to part-time work while still in treatment.

This Court will not consider on appeal a claim not submitted to the district court. "A party has presented an issue in the trial court if that party has raised it in either the pleadings or the pretrial order, or if the parties have tried the issue by consent." Portis v. First Nat'l Bank of New Albany, 34 F.3d 325, 331 (5th Cir. 1994). Burch's First Amended Complaint, upon which his case was tried, complains only of his ADA wrongful termination claim (in addition to his Texas law defamation and intentional

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manager's position demanded a full-time manager. Turco v. Hoechst Celanese Corp., 101 F.3d 1090, 1094 (5th Cir. 1996); Daugherty v. City of El Paso, 56 F.3d 695, 700 (5th Cir. 1995) (citing Chiari v. City of League City, 920 F.2d 311, 318 (5th Cir. 1991)), cert. denied, 116 S.Ct. 1263 (1996).

Burch's citation of Rizzo v. Children's Learning Ctrs., Inc., 84 F.3d 758, 765 (5th Cir. 1996), does not support his position. Rizzo, a summary judgment case in which this Court held that an employer's decision to lower a concededly disabled employee's hours, to require her to work a "split shift," and to change her position from bus driver to cook produced a fact issue as to whether there had been an adverse employment action, left unresolved whether the changes were an adverse employment action or were merely efforts to accommodate the employee's disability.

infliction of emotion distress claims). The record before us contains no pretrial order. The jury was not charged concerning Coca-Cola's pretermination refusal to permit Burch to return to work on a part-time basis, and there was no request for such a change nor objection to its omission. There is nothing in the trial record to suggest----nor does Burch contend----that this separate claim was tried by consent as contemplated by Rule 15(b). See Moody v. FMC Corp., 995 F.2d 63, 65-66 (5th Cir. 1993). In sum, Burch abandoned any such claim by not properly raising it in the district court.

Burch's second argument is that Coca-Cola "refused his request that he be allowed to come back to work full-time." As stated, this claim was not properly analyzed as a failure to accommodate. Burch did not request an accommodation, he requested to return to his position as he left it when he entered treatment on September 26, 1993. He sought no changes to his position and desired nothing more than the ability to resume his career where he had left it. It is undisputed that throughout his absence he had remained on full salary as a Coca-Cola employee.[12] Coca-Cola's employee benefit plan paid for his treatment. Burch argues that the jury was free to reject Coca-Cola's explanation that Burch was terminated for his improper behavior at the managers meeting, but whether Coca-Cola would have fired a nonalcoholic for the same behavior is relevant only to an intentional discrimination

[12] Burch does not complain that Coca-Cola ever denied a prospective request for a leave of absence. We therefore have no need to address whether an employer would be required, in certain circumstances, to offer a leave of absence to an employee whose alcoholism qualified as a disability under the ADA.

claim. Here, Burch requested only Coca-Cola's grace----a request that Coca-Cola refrain from an employment action that, absent conflict with the ADA's intentional discrimination provision, Coca-Cola was left free to undertake.[13] The determination of whether Coca-Cola was required to refrain from terminating Burch because its true reasons for dismissal were discriminatory is at the heart of the subjective inquiry required to establish intentional discrimination under the ADA. Burch cannot characterize his intentional discrimination claim as a "request for accommodation" in order to take advantage of the objective inquiry under section 12112(5). A qualified individual with a disability who asks only to return to work----but who is instead fired by his employer----is entitled (on a proper evidentiary showing) to have the jury consider whether the employer acted with discriminatory intent, not whether permitting the employee to return to his old (unmodified) job would have been reasonable. As Burch had advanced no cognizable request for accommodation at the time of his termination, Coca-Cola's decision to terminate him was not actionable under section 12112(b)(5).[14] We therefore

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[13] Burch was an at-will employee. Apart from the ADA's proscription of discrimination, Coca-Cola was free under Texas law to terminate Burch "for a good reason, a bad reason, or no reason at all." Figueroa v. West, 902 S.W.2d 701, 704 (Tex. App.--El Paso 1995, no writ); see also Schroeder v. Texas Iron Works, Inc., 813 S.W.2d 483, 489 (Tex. 1991); Jones v. Legal Copy, Inc., 846 S.W.2d 922, 925 (Tex. App.--Houston 1993, no writ).

[14] Coca-Cola cites a number of cases for the proposition that employers are under no obligation to accommodate misconduct that is the product of an employee's alcoholism. These cases are a correct

interpretation of section 12114(c)(4), which permits employers to hold alcoholic employees to the same standard of conduct as nonalcoholic employees. Section 12114(c)(4), unlike the pre-1992 Rehabilitation Act, does not require employers to excuse violations of uniformly-applied standards of conduct by offering an alcoholic employee a "firm choice" between treatment and discipline. Compare Fuller v. Frank, 916 F.2d 558, 562 (9th Cir. 1990) (discussing firm-choice rule); Rodgers v. Lehman, 869 F.2d 253, 259 (4th Cir. 1989) (same), with Johnson v. Babbitt, EEOC No. 03940100, 1996 WL 159072 (EEOC Mar. 28, 1996) (finding 1992 amendment to Rehabilitation Act, 29 U.S.C. § 791(g), which incorporated section 12114(c)(4), eliminated the requirement that an employer provide a "firm choice" as an accommodation). But cf. Office of the Senate Sergeant at Arms v. Office of Senate Fair Employment Practice, 95 F.3d 1102 (Fed. Cir. 1996) (finding that amended Rehabilitation Act obliged employer to provide leave for treatment to a disabled alcoholic as a reasonable accommodation, but did not require a "retroactive accommodation" by excusing misconduct).

In the cases cited by Coca-Cola, the employer's reason for termination was either uncontested or unrefuted by the employee. See, e.g., Siefkin v. Village of Arlington Hgts., 65 F.3d 664 (7th Cir. 1995) (granting summary judgment in ADA case in which the plaintiff-employee conceded termination for failing to monitor and control his diabetes, causing an auto accident); Maddox v. University of Tenn., 62 F.3d 843, 848 (6th Cir. 1995) (granting employer's summary judgment motion where alcoholic football coach failed to rebut employer's evidence that it terminated him for misconduct); Little v. FBI, 1 F.3d 255, 259 (4th Cir. 1993)

hold that the magistrate judge should have granted Coca-Cola's motion for judgment as a matter of law on Burch's reasonable accommodation claim.[15]

(affirming dimsissal of alcoholic FBI agent's ADA claim where "it plainly appears that the appellant was fired because of his misconduct [being drunk on duty], not because of his alcoholism"); Rodgers v. County of Yolo Sheriff's Dep't, 889 F.Supp. 1284, 1291 (E.D. Ca. 1995) (granting employer's summary judgment motion in Rehabilitation Act case involving an alcoholic police officer where evidence was "unrefuted and demonstrates that plaintiff['s] termination was based on poor performance"); see also Collings v. Longview Fibre Co., 63 F.3d 828, 831-32 (9th Cir. 1995) (affirming grant of summary judgment for employer of drug abusing employees where employees failed to rebut employer's contention that they were terminated for drug-related misconduct; specifically, no showing that other employees had been treated differently for engaging in similar conduct and no showing that employer knew employees were former drug abusers), cert. denied, 116 S.Ct. 711 (1996). Here, had Burch requested a cognizable (and reasonable) accommodation, and had he been a qualified individual with a disability, the jury arguably would have been free to reject Coca-Cola's proffered nondiscriminatory reason for termination. Burch did not so request and was not so qualified. Coca-Cola is correct, however, that a "second chance" or a plea for grace is not an accommodation as contemplated by the ADA. See Siefkin, 65 F.3d at 666 ("Siefkin is not asking for an accommodation; he is not asking the Village to change anything. He is asking for another chance . . . . But the ADA does not require this.").

[15] Coca-Cola, quoting Wells v. Dallas Indep. Sch.

II. Intentional Discrimination

Under Title I of the ADA, an employer cannot discriminate against a "qualified individual with a disability because of the disability of such individual in regard to . . . the hiring, advancement, or discharge of employees." 42 U.S.C. § 12112(a). In order to establish a prima facie case of intentional discrimination under the ADA, this Circuit has required a plaintiff to present either direct evidence of discrimination or show "'(1) he or she suffers from a disability; (2) he or she is qualified for the job; (3) he or she was subject to an adverse employment action; and (4) he or she was replaced by a non-disabled person or was treated less favorably than non-disabled employees.'" Daigle v. Liberty Life Ins. Co., 70 F.3d 394, 396 (5th Cir. 1995); (citing McDonnell Douglas Corp. v. Green, 93 S.Ct. 1817, 1824 (1973)).

Dist., 793 F.2d 679, 684 (5th Cir. 1986), further argues for a new trial because the size of the jury verdict----over $7 million prior to remittitur----was "'so exaggerated as to indicate bias, passion, prejudice, corruption, or other improper motive.'" Although our decision obviates the need to reach this issue, we note that even had Burch's case not suffered from the evidentiary deficiencies we find dispositive, a jury's verdict so grossly excessive as this would most probably warrant a new trial under the standard set forth in Wells. Burch's argument that because his counsel requested $56 million from the jury----an amount argued to represent one day of Coca-Cola's net profits per day the jury heard the trial----the lower figure awarded "shows that [the jury] was not unduly prejudiced in Burch's favor" is not persuasive.

At the close of Burch's case, Coca-Cola moved for judgment as a matter of law on Burch's intentional discrimination claim pursuant to Rule 50. Coca-Cola based its motion on the grounds that Burch had not established that his alcoholism was a disability, that Burch had demonstrated neither that he had been replaced by a nonalcoholic employee nor that nonalcoholic employees had been treated more favorably, and that Burch had not shown any direct evidence of discriminatory motive on the part of Coca-Cola. The magistrate judge granted Coca-Cola's motion without stating specific grounds.

Burch argues that the magistrate judge's ruling was premised on an erroneous understanding of the prima facie elements of an intentional discrimination claim under the ADA. Specifically, Burch contends that the magistrate judge granted Coca-Cola's motion because Burch had failed to present evidence that he had been replaced by a someone who was not disabled (without permitting him to demonstrate disparate treatment). Such a position, Burch argues, is contrary to our established caselaw setting forth the prima facie case for intentional discrimination under the ADA. Amicus Curiae EEOC, which also understands the magistrate judge to have precluded Burch from advancing disparate treatment proof, urges reversal of that ruling.[16]

Coca-Cola argues that the magistrate judge's ruling is supportable on each of its three asserted grounds and that any confusion as to the ruling is explainable by the

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[16] The EEOC took no position on any other issue in this appeal.

responses given by Burch's counsel in argument on the motion.[17]

Because Burch failed to establish that he suffered from a disability as that term is defined in the ADA, and because such a failure is fatal to his ADA intentional discrimination claim, we affirm the magistrate judge's grant of Coca-Cola's Rule 50 motion on that basis. Accordingly, we do not address whether Burch's disparate treatment evidence would have been sufficient to establish the fourth element of his prima facie case.

The ADA defines "disability" alternatively. A plaintiff who sues on an intentional discrimination theory can rely on any of the three alternatives. The ADA provides:

"The term 'disability' means, with respect to an individual--

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[17] There is some merit to Coca-Cola's contention. Burch's counsel argued before the trial court not that Burch had to demonstrate either that he had been replaced by a nondisabled employee or was treated less favorably than nondisabled employees, but rather that he was required to demonstrate neither. Burch's counsel argued that, under the rule set forth in Doe v. Kohn Nast & Graf, P.C., 862 F.Supp. 1310, 1318 & n.5 (E.D. Pa. 1994), the fourth prong of the McDonnell Douglas standard was inapplicable in a wrongful termination claim. Of course we have never so held and Burch does not advance this argument on appeal. See Daigle, 70 F.3d at 396.

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment." 42 U.S.C. § 12102(2).

A. Substantially Limiting Impairment

For the reasons set forth above, see supra part I.A., we hold that Burch failed to establish that his alcoholism ever substantially limited a major life activity, including the major life activity of working.

B. Record of an Impairment

The ADA does not define "record of such an impairment," but the regulations and the interpretive guidance promulgated by the EEOC make clear that Burch, at some point in the past, must have met or been classified as meeting the standard set forth in section 12102(2)(A). The regulations provide:

"(k) Has a record of such impairment means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more of the major life activities." 29 C.F.R. § 1630.2(k) (1996) (second emphasis added).

The interpretive guidance also stresses that "[t]he impairment indicated in the record must be an

impairment that substantially limits one or more of the individual's major life activities." 29 C.F.R. § 1630, App. (1996).

Burch's argument that he had a record of an impairment when Coca-Cola fired him rests entirely on the assumption that his alcoholism substantially limited a major life activity prior to his treatment at Charter. We have already rejected this contention. At most, Burch had a record of treatment for alcohol abuse and/or alcoholism. That Burch's alcoholism was severe enough to warrant treatment does not establish a record of a disability. As we have determined that Burch offered insufficient evidence establishing that even his untreated alcoholism substantially limited any major life activity, we fail to see how treatment for a nondisability alters his status in any significant way. Accordingly, we hold that Burch was not an individual with a record of an impairment that substantially limited any major life activity under section 12102(2)(B).

C. Regarded as Having an Impairment

"One is regarded as having a substantially limiting impairment if the individual (1) has an impairment which is not substantially limiting but which the employer perceives as constituting a substantially limiting impairment; (2) has an impairment which is substantially limiting only because of the attitudes of others toward such an impairment; or (3) has no impairment at all but is regarded by the employer as having a substantially limiting impairment." Bridges v. City of Bossier, 92 F.3d 329, 332 (5th Cir. 1996) (citing Dutcher, 53 F.3d at 727-28 n.19), cert. denied, 117 S.Ct. 770 (1997).

Whether Burch qualifies under the "regarded as" prong turns on whether the evidence supports such a finding under the first or third definition.[18] Both definitions require Coca-Cola to have perceived Burch's alcoholism as substantially limiting when, in fact, it was not. Burch does not argue that Coca-Cola regarded his alcoholism as disabling and such a finding is not supported by the record. Coca-Cola unquestionably considered Burch to be an alcohol abuser and concedes that alcohol consumption may have induced the conduct for which it claimed Burch was fired. Burch's testimony, and that of Dr. Nace, would also support a jury finding that Coca-Cola regarded Burch as suffering from alcoholism, as that condition was defined at trial. But, as in our discussion of actual disabilities, we do find the evidence insufficient to support a finding that Coca-Cola regarded Burch as anything other than what he actually was: an alcoholic whose alcoholism did not substantially impair any major life activity, including the major life activity of working.

We find guidance in our recent decision in City of Bossier. In City of Bossier, we held that, in order for an employer to have regarded an impairment as substantially limiting in the activity of working, the employer must regard an individual as significantly restricted in the ability to perform a class or a broad

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[18] The record evidence does not show that negative reactions by others toward known alcoholics substantially limited Burch in any manner. Dr. Nace testified only that a "skidrow image" of alcoholics has persisted. There was no evidence suggesting that Coca-Cola employees embraced this view and we will not presume that its prevalence is so pervasive.

range of jobs. 92 F.3d at 332. Burch produced no evidence that Coca-Cola regarded him to be so limited.

Coca-Cola may have been concerned about Burch's acknowledged "inappropriate" behavior, about his short temper, and about a specific instance of off-hour conduct, but Burch offered no evidence that demonstrates Coca-Cola regarded his alcoholism as substantially limiting his ability to work or his other major life activities. The record demonstrates that Coca-Cola was aware of the favorable letters submitted by Drs. Nace and Matamoros at the time of the termination decision. There was no evidence suggesting that Coca-Cola either discredited Burch's physicians' view that Burch's alcoholism would not affect his prospective ability to refrain from inappropriate conduct or that its managers premised their decision on such a position. But, significantly, even if Coca-Cola had considered Burch's alcoholism as an impediment to his position with the company, that would not end our inquiry. Coca-Cola must have understood Burch's alcoholism to preclude employment in an entire class of jobs. Assuming Coca-Cola regarded his alcoholism as precluding employment as an area service manager with direct reporting authority over approximately twenty employees and a wide geographic area, such a conclusion falls far short of the standard set forth in City of Bossier. Id. at 334 (finding that an impairment that precluded employment in any position "involving routine exposure to extreme trauma" precluded only a "narrow range of jobs"); see also Wooten v. Farmland Foods, 58 F.3d 382, 386 (8th Cir. 1995) ("restrictions against working with meat products in a cold environment . . . only appeared to prevent [plaintiff] from performing a narrow range of meatpacking jobs"). The record is silent as to any

conception, or misconception, held by Coca-Cola that alcoholism, alone, renders an alcoholic employee substantially impaired. Indeed, the fact that Coca-Cola had in place an employee assistance program designed to assist employees who may be experiencing problems with alcohol through referrals and counseling weighs in favor of the opposite conclusion.

As there was insufficient evidence to establish that Coca-Cola regarded Burch as disabled, and because Burch did not otherwise establish that he met the statutory definition of disabled, we hold that Burch failed to meet the prima facie elements of intentional discrimination under the ADA. Coca-Cola's motion for judgment as a matter of law was properly granted on Burch's intentional discrimination claim.

III. Defamation

Burch appeals the magistrate judge's grant of summary judgment in favor of Coca-Cola on his Texas law defamation claim. Burch argues that two statements by Coca-Cola were defamatory. The first was a statement by Charles Rose, an employee in Coca-Cola's human resources department, to Drake, Beam & Morin to the effect that Burch had been terminated for violent and threatening behavior. The second, from Cutshall to Smith, communicated a somewhat similar message. The magistrate judge granted summary judgment on the ground that these statements were opinion and, as such, were not actionable under Texas law. Memorandum Order at 1 (N.D. Tex. Jun. 7, 1995) (citing Schauer v. Memorial Care Sys., 856 S.W.2d 437, 446 (Tex. App.--Houston 1993, no writ)).

Coca-Cola argues that summary judgment was appropriate because both statements were opinion and, alternatively, that Rose's statement to Drake, Beam & Morin was protected by the common interest privilege. Burch argues that any privilege that Coca-Cola might have had concerning the statements made to Drake was waived by Cutshall's statement to Smith, who was no longer affiliated with Coca-Cola at the time the statement was made.

Finding the statement from Rose to Drake, Beam & Morin protected by the common interest privilege, and finding that the statement from Cutshall to Smith does not support a defamatory meaning, we find no error in the magistrate judge's grant of summary judgment in favor of Coca-Cola.

"Slander is a defamatory statement orally communicated or published to a third person without legal excuse." Halbert v. City of Sherman, 33 F.3d 526, 530 (5th Cir. 1994); Randall's Food Mkts, Inc. v. Johnson, 891 S.W.2d 640, 646 (Tex. 1995). "Accusations or comments about an employee by his employer, made to a person having an interest or duty in the matter to which the communication relates, have a qualified privilege." ContiCommidity Servs., Inc. v. Ragan, 63 F.3d 438, 442 (5th Cir. 1995) (citing Schauer, 856 S.W.2d at 449), cert. denied, 116 S.Ct. 1318 (1996). This privilege extends to statements made in good faith by a former employer to a prospective employer, see Pioneer Concrete of Texas, Inc. v. Allen, 858 S.W.2d 47, 49 (Tex. App.--Houston 1993, writ denied), and those made to agencies engaged in placement services, id. at 50. The privilege can be defeated by showing actual malice or an abuse of the

privilege. ContiCommodity, 63 F.3d at 442; Randall's, 891 S.W.2d at 646.

Burch argues that, although Pioneer held that statements made to placement agencies are covered by the conditional privilege, Rose's statement was not privileged because Drake, Beam & Morin was not a placement firm but rather a firm specializing in employment counseling. We find the distinction insufficient to defeat the privilege.

The privilege described in Pioneer was nothing more than a practical application of Texas's common-interest privilege, which recognizes that public or private interests in the availability of correct information can be of sufficient importance to require protection of the honest communication of misinformation. Pioneer, 858 S.W.2d at 50 (citing Kaplan v. Goodfried, 497 S.W.2d 101, 105 (Tex. App.--Dallas 1973, no writ)). Accordingly, voluntary communications, in addition to communications in response to a request, are privileged "'if the relationship between the parties is such that it is within generally accepted standards of decent conduct to furnish the information for the protection of the recipient.'" Id. (quoting Kaplan, 497 S.W.2d at 105-06).

The communication between Rose, a Coca-Cola human resources employee, and the offices of Drake, Beam & Morin were privileged under Texas's common-interest privilege. First, there was uncontroverted testimony that the standard practice for Drake Beam in particular, and among employment counseling firms in general, was to utilize the reasons for an employee's termination to aid in that employee's employment counseling preparation. Second, there was no evidence suggesting that Rose acted with any purpose other than to assist Burch's search for

subsequent employment.[19] Accordingly, we hold that the

[19] Rose testified:

"Q. Was it your practice to tell the out-placement service the reason for an employee's termination?

A. Yes.

Q. Why is that?

A. There is actually a number of reasons, but the main reason is that it helps the out-placement service do a better job counseling the employee to find their [sic] next job.

. . . .

Q. Tell me how it would help Mr. Burch for Drake Beam & Morin to know that Coca-Cola had terminated him for violent and threatening behavior?

A. A couple of different ways. Drake Beam has a number of different kinds of counselors available to them. It would help them select the person----the person best qualified and best suited to help him from their staff. And secondly, they need to coach their clients on how to answer questions when they get into an interview situation.

. . . .

Q. Have you ever given that type of information about why an employee was discharged to Drake Beam in the past?

A. Yes.

Q. And relating to other employees?

A. Yes.

Q. Have you provided similar information to other out-placement counseling firms other than Drake Beam in other cases?

A. Yes.

Q. In your experience, is that the type of information that Drake Beam wanted to have?

A. Yes.

. . . .

Q. And why is that?

statements made by Rose to Drake Beam were privileged and that Burch failed to establish that Rose, acting on behalf of Coca-Cola, acted with actual malice so as to defeat the privileged nature of the statements.[20]

Burch also asserts that, even if Rose's communication was privileged, Cutshall's communication of similar information to Smith waived the privilege. We disagree. The common-interest privilege is not waived by an unrelated communication of similar information on a separate occasion to a former employee who may be asked to provide a recommendation.

A. When I am on the phone with Drake Beam, they ask me why a person has been terminated."

Rose's affidavit stated:

"The information I provided to Drake Beam was of the type customarily provided to an outplacement firm, and was necessary to enable Drake Beam to effectively provide its services to plaintiff. In accordance with our established business relationship, this information was considered by Coca-Cola and Drake Beam to be strictly confidential."

[20] "'Actual malice is not ill will; it is the making of a statement with knowledge that it is false, or with reckless disregard of whether it is true.'" Duffy v. Leading Edge Prods., Inc., 44 F.3d 308, 313 (5th Cir. 1995) (quoting Carr v. Brasher, 776 S.W.2d 567, 571 (Tex. 1989)). The absence of an additional investigation as to the truth or falsity of a statement has been held insufficient to establish actual malice. Id. (citing Shearson Lehman Hutton, Inc. v. Tucker, 806 S.W.2d 914, 924 (Tex. App.--Corpus Christi 1991, writ dismissed w.o.j.)).

The conditional, common-interest privilege "remains intact as long as communications pass only to persons having an interest or duty in the matter to which the communications relate." Randall's, 891 S.W.2d at 646; Reeves v. Western Co. of N. Am., 867 S.W.2d 385, 394 (Tex. App.--San Antonio 1993, writ denied); Perry Bros. Variety Stores, Inc. v. Layton, 25 S.W.2d 310 (Tex. Comm'n App. 1930, judgm't adopted). Here, however, Burch does not contend that Rose's statement to Drake Beam was communicated, or overheard, by any person not covered by the privilege. Rather, Burch argues that a separate, second statement made on a different occasion, by a different person, and to a different person, communicated at a different time not established by the record, worked a waiver of the privilege that had attached to the statement to Drake Beam. Waiver occurs where the allegedly defamatory statement was made to those outside the interest group. This was not established. See Mitre v. Brooks Fashion Stores, Inc., 840 S.W.2d 612, 619 (Tex. App.--1992, writ denied) (reversing summary judgment because whether a flyer accusing plaintiffs of passing counterfeit bills "was published only to shop employees, or also to the general public" was a fact issue relating to the privilege); Layton, 25 S.W.2d at 313 ("[T]he defamatory statements of Barr lost their privileged character by reason of the fact that same were made in a store open to the general public, and in the presence and hearing of customers who were there . . . and who had no interest in the subject matter of the statements."); see also Danawala v. Houston Lighting & Power Co., 14 F.3d 251, 255 (5th Cir. 1993) (finding "secondary publications" by unauthorized gossip by co-workers did not waive the privilege).

Burch also contends that some time after he was terminated Cutshall defamed him in a telephone conversation with Smith, who was then employed by another company. The only evidence concerning this conversation is Cutshall's deposition testimony. Cutshall there stated he called Smith in order to obtain a favorable reference for Burch, believed that Smith asked him why Burch had been terminated, and that he told Smith "what had been relayed to me as to what had happened," that he did not recall saying Burch had engaged in "violent" behavior, but had "used the word threatening behavior, menacing behavior toward another employee." Nothing more is shown concerning what Cutshall said to Smith. Given the context of Cutshall's conversation, and the undisputed evidence that Burch, a physically imposing 6'5", 223 pounds, at the least had become visibly and obviously very angry at the meeting and mouthed hostile vulgarities to and pointed at a fellow employee there, gesturing with his head for the two of them to go outside, we conclude that this mere snippet of testimony from Cutshall's deposition does not suffice to establish that Cutshall falsely defamed Burch.

Coca-Cola argues that "[i]t is well-settled Texas law that mere statements of opinion are protected as free speech and cannot form the basis of a cause of action for defamation." Burch argues that Coca-Cola's reading of Texas law relies on an abandoned adherence to Gertz v. Robert Welch, Inc., 94 S.Ct. 2997 (1974), and that Texas now follows the view, expressed in Milkovich v. Lorain Journal Co., 110 S.Ct. 2695 (1990), that statements of opinion may be actionable if they imply an assertion of objective fact. We find no inconsistency between the cases cited by Coca-Cola and those cited by Burch. Texas case law plainly protects those communications that are not

objectifiably verifiable. See Carr v. Brasher, 776 S.W.2d 567; Simmons v. Ware, 920 S.W.2d 438 (Tex. App.--Amarillo 1996); Schuller v. Swan, 911 S.W.2d 396 (Tex. App.--Corpus Christi 1995); Schauer, 856 S.W.2d 437; Shearson Lehman Hutton, 806 S.W.2d 914; Yiamouyiannis v. Thompson, 764 S.W.2d 338 (Tex. App.--1988, writ denied), cert. denied, 110 S.Ct. 722 (1990). "'A statement is defamatory if the words tend to injure a person's reputation, exposing the person to public hatred, contempt, ridicule, or financial injury.'" McKethan v. Texas Farm Bureau, 996 F.2d 734, 743 (5th Cir. 1993) (quoting Einhorn v. LaChance, 823 S.W.2d 405, 410-11 (Tex. App.--Houston 1992, writ dismissed w.o.j.) (holding statement that an employee was fired for reasons relating "solely to work performance" was not defamatory because it was nonspecific)), cert. denied, 114 S.Ct. 694 (1994). "'Whether the words are reasonably capable of the defamatory meaning the plaintiff attributed to them is a question of law for the trial court.'" Id. (quoting Kelly v. Diocese of Corpus Christi, 832 S.W.2d 88, 91 (Tex. App.--Corpus Christi 1992, writ refused)). The allegedly defamatory statement must be considered in context and in light of the circumstances surrounding its publication. Id.

We hold that, given the uncontroverted purpose of the communication from Cutshall to Smith----to obtain a favorable recommendation for Burch----and the vague and general nature of the statement made, as well as Burch's admitted conduct at the meeting, Cutshall's statement was not falsely defamatory.

Cutshall testified that his remarks were made for the purpose of obtaining a favorable recommendation. There was no evidence that Cutshall provided any factual

information to Smith other than characterizing the nature of Burch's termination. Cutshall testified that he told Smith "what had been relayed to me as to what had happened." Burch testified that Smith had reviewed his prior performance favorably in evaluations and was aware of Burch's professional ability. Given Cutshall's communicated purpose----to obtain a favorable recommendation----and in light of the circumstances surrounding the statement, we find that no reasonable jury could find that Cutshall's remarks rose to the level of actionable defamation under Texas law.

Conclusion

For the foregoing reasons, we affirm the magistrate judge's grant of judgment as a matter of law on Burch's ADA intentional discrimination claim, affirm the grant of summary judgment on Burch's defamation claim, and reverse the denial of Coca-Cola's motion for judgment as a matter of law on Burch's ADA reasonable accommodation claim. Accordingly, the judgment of the trial court is REVERSED and the cause is REMANDED with instructions to enter judgment dismissing all of Burch's claims against Coca-Cola.

AFFIRMED in part; and REVERSED and REMANDED with instructions

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ROBERT P. BURCH,	§	
Plaintiff,	§	
	§	
V.	§	NO. 3:94CV1894BD
	§	
THE COCACOLA	§	
COMPANY,	§	
Defendant.	§	

JUDGMENT

This action came on for trial before the Court and a jury, Honorable Jeff Kaplan, Magistrate Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged that Plaintiff, Robert P. Burch, recover of Defendant, The CocaCola Company, the sum of $109,000.00 for back pay with prejudgment interest thereon at the rate of 10% per annum from the date each payment became due which amount totals $12,481.05 for prejudgment interest on back pay.

It is Ordered and Adjudged that Plaintiff, Robert P. Burch, recover of Defendant, The CocaCola Company, the sum of $300,000.00 for compensatory damages. Because the statutory cap on compensatory and punitive damages pursuant to 42 U.S.C. § 1981a(b)(3)(D) is $300,000.00, the Court reduces the jury's award of $6,000,000.00 for punitive damages to $0.

It is further Ordered and Adjudged that Plaintiff, Robert P. Burch, recover of Defendant, The CocaCola

Company, the sum of $294,777.58 which amount represents the present value of five years of front pay.

It is further Ordered and Adjudged that Plaintiff, Robert P. Burch, recover of Defendant, The CocaCola Company, the sum of $208,072.00 for reasonable attorney's fees incurred in the preparation and prosecution of Plaintiff's claims under the Americans With Disabilities Act.

It is further Ordered and Adjudged that Plaintiff, Robert P. Burch, recover of Defendant, The CocaCola Company, his costs of court.

It is further Ordered and Adjudged that Plaintiff, Robert P. Burch, recover of Defendant, The CocaCola Company, postjudgment interest on all amounts awarded from the date of Judgment until paid pursuant to 28 U.S.C. § 1961 at the rate of 5.52% per annum.

Signed this 25th day of September, 1995.

/S/
PRESIDING JUDGE

AGREED AS TO FORM ONLY:

/s/
Jennifer Judin,
Attorney for Plaintiff

/s/
Stuart Tonkinson,